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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, Secretary of Labor, *Petitioner,*

v.

WALTER BACHOWSKI, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Walter Bachowski, opposes the Petition for Writ of Certiorari for the reasons presented herein.

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the determination of the Secretary of Labor not to bring suit under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to upset a

challenged union election is beyond the scope of permissible judicial review even if such determination is arbitrary and capricious or is so outrageous as to amount to an abuse of discretion.

COUNTERSTATEMENT OF THE CASE

Respondent Walter Bachowski was a candidate for the office of District Director of District 20 of the United Steelworkers of America in an election held on February 13, 1973. By the Steelworkers' own count, he was defeated by the narrow margin of 907 votes out of approximately 24,000 votes cast. After exhausting intra-union remedies without satisfaction, he complained to the Department of Labor, June 21, 1973, presenting evidence of substantial wrong-doing in violation of the Steelworkers' constitution and of Title IV, LMRDA, which affected the election outcome. Following investigation of the complaint, the Secretary sent respondent a notification advising him of the determination not to bring suit seeking to upset the election, but wholly failing to state any reasons whatever other than the most conclusory recital that it had been determined that action would not be warranted. Respondent then brought the present suit, naming the Secretary and the Union as defendants.

Respondent relies upon the description of his complaint, set forth in the opinion of the court of appeals. As the Secretary himself concedes, the complaint, of course, must be accepted here as wholly correct. The Court stated as follows:

> "The complaint alleges, *inter alia*, that the Secretary's investigation had substantiated the enumerated charges of election irregularities and that these irregularities affected the outcome of the election, but that the Secretary nevertheless refused to file a suit to set aside the election and failed even to inform Bachowski of his reasons for that refusal. The complaint concludes that these actions by the Secretary were arbitrary and capricious and requests that the district court direct the Secretary (1) to make available to the plaintiff all evidence he has obtained concerning his investigation of the contested election, (2) to reach an agreement with the union extending the period of time for filing suit to set aside that election, and (3) to file such suit" (Pet. App. p. 3A).

As stated by the Secretary, the district court dismissed the complaint for lack of jurisdiction. The court of appeals unanimously reversed, finding jurisdiction and concluding that the Secretary's determination not to bring suit is subject to judicial inquiry whether his action was arbitrary and capricious or an abuse of discretion.

REASONS FOR DENYING THE WRIT

Stripped of ornamentation the Secretary's claim is simply that Title IV, LMRDA, gives him the right to resolve union election challenges however he chooses, even arbitrarily and capriciously, wholly without judicial check. Coming from a responsible government official, the position is arrogant and more than a little shocking. Also it is at odds with the legislative command of Section 402(b) of LMRDA that the Secretary *shall* bring suit to upset a challenged election when his investigation reveals probable cause to do so. The holding of the court of appeals does no more than reject the Secretary's extraordinary claim and hardly presents a proper occasion for exercise of the certiorari power.

1. The asserted conflict between the decision of the court of appeals and *Howard* v. *Hodgson*, 490 F.2d 1194 (C.A. 8, 1974) and *Brennan* v. *Silvergate District Lodge No. 50*, Nos. 72-2657, *et al.* (C.A. 9, September 13, 1974) is illusory.

Contrary to the petition, *Howard* does not hold the Secretary's determination not to sue under Title IV immune from review as to whether such determination was arbitrary and capricious or an abuse of discretion. The *Howard* plaintiffs—unlike respondent—were not challenging the Secretary's determination on that basis. Theirs was a case where the Secretary had found Title IV violations but had determined that such violations had not affected the outcome of the election. The *Howard* plaintiffs claimed that whenever the Secretary's investigation reveals Title IV violations, he is compelled to bring suit and leave the question of effect on outcome for a court. Accordingly, their suit was in the nature of mandamus to compel initiation of suit, which they maintained was required by law. The Eighth Circuit looked to a regulation promulgated by the Secretary to the effect that the Secretary will not bring suit unless his investigation reveals that such violations as occurred may have affected the election outcome. 29 CFR 452.16(b). Reciting that "/n/o useful purpose would be served by requiring the Secretary of Labor to bring frivolous suits," 490 F.2d at 1196, the Eighth Circuit sustained the regulation and held that the Secretary has discretion to determine the question of effect on election outcome, as well as the question whether violations occurred. But the *Howard* court stressed that its holding "is not to say that the Secretary's discretion under Section 482 is absolute." 490 F.2d at 1196. Respondent—unlike the *Howard* plaintiffs—admits that the Secretary has discretion but

claims in this case that the Secretary's determination was so arbitrary and capricious as to amount to an abuse thereof. To the extent that *Howard* speaks to this question, the explicit limitation on its holding—wholly overlooked in the petition—indicates that such administrative action is not immune from review.

Brennan v. *Silvergate District Lodge, supra,* is still further from the point. That was a case in which an incumbent union official, who had been defeated in a rerun election conducted pursuant to court order under the Secretary's supervision, sought to intervene to challenge the Secretary's certification to the district court of the election results. The Court of Appeals held that intervention had properly been denied. While respondent seriously questions the correctness of that decision,[1] the decision does not conflict with that of the Third Circuit here. That case involved the right to intervene; it did not involve an attempt to secure judicial review of a determination of the Secretary which was asserted to be arbitrary and capricious or an abuse of discretion. There is nothing in the Ninth Circuit case which can fairly be read as barring judicial review in a case such as this.

2. Its assertions of conflict evaporating, all that is left of the petition is its parade of ways in which it is said that the court of appeals decision will undermine effective enforcement of Title IV.[2] To

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[1] See *Hodgson* v. *Carpenters Resilient Flooring Local Un. No. 2212*, 457 F.2d 1364 (C.A. 3, 1972), which would have allowed intervention in the *Silvergate* situation.

[2] The Secretary also seeks to analogize his determination whether to bring suit to the discretion exercised in determining whether to commence criminal prosecution. This contention is effectively answered by the discussion in the opinion of the Court of Appeals (Pet. App. A, pp. 12A *et seq.*). Respondent notes only that this

listen to the Secretary, effective Title IV enforcement depends upon his being allowed to proceed, without check, exactly as he chooses. It is said that the court of appeals decision will destroy the "screening process" which Congress intended would protect unions from frivolous litigation; that it will take away the centralized administration of LMRDA without which "a rational and coordinated program of implementation" would be impossible; that it will hamstring the Secretary in settling challenges with unions whose elections are challenged; and that it would upset the statutory timetable which directs that the Secretary bring suit, if at all, within 60 days of receiving a Title IV complaint.

All of these horribles are now thoroughly familiar, because the Secretary has paraded them every time his insistence upon absolute license to proceed as he wishes has been challenged in any way. Cf. *Trbovich* v. *UMWA*, 404 U.S. 528 (1972). The Title IV screening process was intended to assure that meritorious challenges would be forcefully litigated as well as to see that frivolous ones are weeded out; the limited review contemplated by the court of appeals decision would do no more than assure that the process is working as Congress intended.

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case is far different from *Vaca* v. *Sipes*, 386 U.S. 171 (1967), which referred to an appellate decision holding that the NLRB General Counsel's discretion whether to institute an unfair labor practice charge is unreviewable. *Vaca* held that a union member asserting breach of the duty of fair representation is free to pursue a judicial remedy even though the Board has refused to proceed. It is precisely because the Title IV complainant does not have any other means of challenging a union election than through the Secretary of Labor—and because this Court has recognized that the Title IV complainant has distinct interests commanding judicial recognition and protection (*Trbovich* v. *UMWA*, 404 U.S. 528 (1972))—that judicial review should be available to assure that the Secretary's discretion has not been abused.

The Secretary's protestation that the court of appeals decision would inhibit him from entering into settlement agreements with unions reflects the same disdain for the rights and interests of Title IV complainants which the Secretary displayed to the Court in *Trbovich, supra.* The Court in *Trbovich* recognized that the complainant does have interests in Title IV matters which are distinct from the Secretary's interests and which deserve protection. A complainant who has intervened in Title IV litigation under the authority of *Trbovich* has a far greater opportunity to stand in the way of a settlement proposed by the Secretary and the Union, than does a complainant who bears the burden of showing that the Secretary's action is an abuse of discretion. The court of appeals here—in upholding limited judicial review at the behest of the complainant where it is alleged that the Secretary has acted arbitrarily and capriciously—simply put itself in step with the decision of this Court in *Trbovich, supra;* cf. *International Union, UAW* v. *Scofield,* 382 U.S. 205 (1965).

Perhaps most ill-graced is the Secretary's plea for preservation of the 60-day statutory timetable for initiation of suits. The Secretary routinely enters into agreements with unions for extensions of time within which suit may be brought, and in fact agreed to two such extensions in this very case. If the Secretary and unions under investigation can delay suit for no reason other than their own convenience, surely suit can also be filed outside the 60-day period without disservice to effective enforcement, where the Secretary's original determination not to bring suit is found by a court to have been arbitrary and capricious.

* * *

Under Title IV the Secretary of Labor is entrusted with vast power and broad discretion, but if the legislative goal is to assure that union elections are fair and democratic, the Secretary's power must be responsibly exercised. It is upon responsible exercise of the Secretary's power—and not upon the unbridled license for which the Secretary contends—that effective enforcement of LMRDA depends. As with any administrative program, arbitrary and capricious conduct on the part of the administrator is far more inimical to interests of rationality than the limited review necessary to see that his discretion is exercised within bounds. There is no merit in the Secretary of Labor's quest for an immunity from judicial review not accorded any other agency head administering statutes similarly yielding broad administrative discretion.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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